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In the Supreme Court of the United States

OCTOBER TERM, 1979

W. L. WEARLY, ET AL., PETITIONERS

v.

FEDERAL TRADE COMMISSION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE FEDERAL TRADE COMMISSION IN OPPOSITION

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QUESTION PRESENTED

When Congress has prescribed a procedure by which objections to Federal Trade Commission subpoenas can be raised without risk in an enforcement hearing in the district court, whether subpoena recipients may bypass that procedure by filing a collateral action for preenforcement review.

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*In addition to the parties named in the caption in this Court, the individual members of the Federal Trade Commission were co-parties with the Commission in the courts below. Ingersoll-Rand Company and The Torrington Company were also co-parties with W.L. Wearly in the lower courts.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-14a), as amended (Pet. App. 15a-19a), is reported at 616 F. 2d 662. The principal opinion of the district court (Pet. App. 52a-88a) is reported at 462 F. Supp. 589. Two subsequent opinions of the district court (Pet. App. 93a-109a, 110a-123a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on February 8, 1980. A petition for rehearing was denied on March 20, 1980 (Pet. App. 16a-19a). The petition for a writ of certiorari was filed on April 18, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTES INVOLVED

Pertinent portions of Sections 6, 9, and 10 of the Federal Trade Commission Act, 15 U.S.C. 46, 49, and 50, as they existed at the time the petition for certiorari was filed, together with the judicial review provisions of the Administrative Procedure Act, 5 U.S.C. 701-706, are set forth at Pet. App. 144a-152a.

Pertinent portions of the Federal Trade Commission Improvements Act of 1980, Pub. L. No. 96-252, 94 Stat. 374, approved May 28, 1980, are set forth in App., *infra*, 1a-9a.

STATEMENT

In September 1976, the Federal Trade Commission issued a subpoena duces tecum to W.I.. Wearly in his capacity as an officer and chairman of the board of directors of Ingersoll-Rand Company. The subpoena was issued in connection with an investigation to determine whether Ingersoll, The Torrington Company (an Ingersoll

subsidiary), and other persons in the needle-roller bearing industry may have engaged in unfair methods of competition in violation of Section 5 of the Federal Trade Commission Act, 15 U.S.C. 45 (Pet. App. 3a-4a).

Petitioners Wearly and Ingersoll moved the Commission to quash the subpoena, claiming, among other things, that the subpoena required the production of confidential trade secrets that the Commission had no authority to demand (Pet. App. 4a). Several months of negotiations followed, during which the Commission's staff agreed to several modifications of the subpoena and advised petitioners that, upon production of the documents, the staff would recommend that the Commission grant special confidential treatment to any Ingersoll documents qualifying for such treatment.

The Commission affords "special confidential treatment" in appropriate cases to protect confidential commercial and financial information, the public disclosure of which may cause competitive injury. If the Commission finds that documents contain confidential business information and that disclosure of that information may cause competitive harm, the Commission agrees by letter not to disclose the confidential portions of the documents to any person other than a Commission employee or consultant[1] without first giving the submitting party 10 days notice of its intention to do so. This commitment does not apply to official requests of a congressional committee or subcommittee or to responses

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[1]Section 10 (para. 4) of the FTC Act, 15 U.S.C. 50, prescribes criminal penalties for any officer or employee of the Commission who discloses without Commission approval any information obtained by the Commission.

required by compulsory court process, although the Commission promises to give as much advance notice as possible in those circumstances.[2]

Petitioners eventually produced certain documents but declined to release any materials they considered to be confidential. They did not apply to the Commission for special confidential treatment.[3] The Commission subsequently granted in part and denied in part petitioner's motion to quash the subpoena (Pet. App. 128a-134a). The Commission reiterated the staff's statement that it would consider an application from Ingersoll for special confidential treatment if Ingersoll specified the documents for which such treatment was sought and set forth adequate supporting grounds (Pet. App. 134a).

Instead of requesting special confidential treatment, petitioners filed this action in the United States District Court for the District of New Jersey. Their complaint sought to enjoin the Commission from instituting a proceeding to enforce the subpoena and to have certain subpoena demands declared unlawful (Pet. App. 4a). The

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[2]The confidentiality procedures described above have been sustained in two circuits. *FTC* v. *Owens-Corning Fiberglass Corp.*, 1980-1 Trade Cases (CCH) para. 63,228, at 78,113 (D.C. Cir. Mar. 13, 1980); *FTC* v. *Anderson*, 1979-2 Trade Cases (CCH) para. 62,837, at 78,825-78,827 (D.C. Cir. 1979); *Exxon Corp.* v. *FTC*, 589 F. 2d 582, 586-687 (D.C. Cir. 1978), cert. denied, 441 U.S. 943 (1979); *FTC* v. *Rockefeller*, 441 F. Supp. 234, 242 (S.D.N.Y. 1977), aff'd, 591 F. 2d 182 (2d Cir. 1979). These procedures recently have been modified to comply with restrictions on disclosure of trade secrets and confidential commercial or financial information prescribed in Section 3(a) of the Federal Trade Commission Improvements Act of 1980, Pub. L. No. 96-252, 94 Stat. 374, approved May 28, 1980, App., *infra*, 1a-9a. See 45 Fed. Reg. 36338 (1980). The effect of these changes is discussed on pages 7-9, *infra*.

[3]See the Appendix filed by petitioners in the court below in case No. 78-1115, at 91-130.

district court denied petitioners' request for a preliminary injunction against enforcement of the subpoena but temporarily stayed the return date of the subpoena and ordered Ingersoll to hold the disputed documents in the constructive custody of the court (Pet. App. 4a).[4]

The Commission thereafter moved to dismiss the complaint, contending, *inter alia*, that all of petitioners' claims could be fully litigated in a subpoena enforcement proceeding brought by the Commission under 15 U.S.C. 49, and that petitioners therefore had an adequate remedy at law in the enforcement proceeding. The district court denied the Commission's motion to dismiss the complaint and entered a judgment (Pet. App. 89a-92a) declaring, *inter alia*, that the subpoena called for the production of documents containing trade secrets and confidential business information that are entitled "to protection from taking by the government for private use by unauthorized disclosure, or for public use without just compensation" (Pet. App. 90a). The judgment included a protective order which, in effect, continued the court's constructive custody of the contested documents (Pet. App. 91a-92a).

In the meantime, following the Third Circuit's vacation of the district court's stay order, the Commission filed an independent enforcement proceeding in the United States District Court for the District of Columbia, the district in which the Commission's "inquiry is carried on." See 15 U.S.C. 49. That enforcement proceeding has been held in abeyance pending the outcome of this litigation.[5]

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[4]The court of appeals subsequently vacated the district court's stay order (Pet. App. 4a-5a).

[5]The United States District Court for the District of Columbia, after hearing petitioners' confidentiality claims and other defenses, enforced the subpoenas (Pet. App. 4a). However, in an unreported opinion, the United States Court of Appeals for the District of Columbia Circuit vacated the enforcement order of the district court until completion of the proceedings in the Third Circuit (Pet. App. 5a).

On cross appeals from the judgment of the United States District Court for the District of New Jersey, the United States Court of Appeals for the Third Circuit held that the district court lacked jurisdiction to entertain petitioners' preenforcement suit. The court explained (Pet. App. 7a-8a):

> We start with the basic premise that a subpoena from the FTC is not self-enforcing. The agency must go to the district court and petition for an order directing compliance with the subpoena. In acting on that petition the district court's role is not that of a mere rubber stamp, but of an independent reviewing authority called upon to insure the integrity of the proceeding. * * * In the discharge of that duty, the court has the power to condition enforcement upon observance of safeguards to the respondent's valid interests. [Footnote omitted.]

The court added that "[r]esort to a court by recipients of investigative subpoenas before an action for enforcement has been commenced is generally disfavored" (Pet. App. 8a), citing this Court's decisions in *Reisman* v. *Caplin*, 375 U.S. 440 (1964), and *FTC* v. *Claire Furnace Co.*, 274 U.S. 160, 174 (1927), as well as court of appeals decisions.

The court also examined the case to determine whether it was sufficiently "ripe" for judicial review under the two-fold "fitness" and "hardship" tests formulated by this Court in the *Abbott Laboratories* trilogy.[6] The court found that neither test was satisfied. It pointed out that the controversy was not ripe for judicial review because there had been no final agency action: "the agency had yet

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[6] *Abbott Laboratories* v. *Gardner*, 387 U.S. 136, 149 (1967); *Toilet Goods Ass'n* v. *Gardner*, 387 U.S. 158, 162 (1967); *Gardner* v. *Toilet Goods Ass'n*, 387 U.S. 167 (1967).

to take a position on which documents should be subject to what type of confidential treatment" (Pet. App. 12a-13a). The court also explained that there was no substance to petitioners' assertion that, absent judicial intervention, petitioner Wearly would be confronted with the dilemma of either complying with the subpoena or facing possible criminal prosecution under Section 10 of the FTC Act, 15 U.S.C. 50. The court held that Wearly could await the institution of a proceeding by the Commission to enforce the subpoena with no risk to himself because liability does not arise under Section 10 if the witness has interposed a good faith objection to the subpoena (Pet. App. 13a). The court found that nothing in the record suggests that Wearly's noncompliance had been contumacious (Pet. App. 14a).

ARGUMENT

In *Reisman* v. *Caplin*, 375 U.S. 440 (1964), this Court reaffirmed the principle that courts should not entertain collateral suits challenging agency process when a statutory enforcement proceeding provides an adequate and effective means of securing a judicial hearing on objections to the process before any penalties attach. The court of appeals correctly applied the *Reisman* doctrine in this case. No decision of any court of appeals conflicts with the court of appeals' holding here. Moreover, petitioners' fears of competitive injury have been substantially eliminated by the newly enacted provisions of the Federal Trade Commission Improvements Act of 1980, Pub. L. No. 96-252, 94 Stat. 374, which provide additional protection for trade secrets and confidential commercial or financial information contained in subpoenaed documents. Further review by the Court is therefore unwarranted.

1. The gravamen of petitioners' district court complaint is that "the FTC [is] not entitled to production of documents containing valuable proprietary information in view of the FTC's refusal to provide adequate protection against disclosure" (Pet. 5). Petitioners' concerns about confidentiality are obviated by Pub. L. No. 96-252, which creates comprehensive protection for confidential documents and information obtained by the Commission in law enforcement investigations. Several of the provisions of the new statute are applicable in this case. The statute amends Section 6(f) of the FTC Act to prevent the Commission from making public "any trade secret or any commercial or financial information which is obtained from any person and which is privileged or confidential." The Commission is permitted to disclose such information to Federal and State law enforcement agencies, but only upon prior certification that the information will be maintained in confidence and will be used solely for official law enforcement purposes. Pub. L. No. 96-252, Section 3(a)(2), 94 Stat. 374, App., *infra*, 1a-2a.

The new statute also exempts from the mandatory disclosure requirements of the Freedom of Information Act, 5 U.S.C. 552 *et seq.*, "[a]ny material which is received by the Commission in any investigation, a purpose of which is to determine whether any person may have violated any provision of the laws administered by the Commission, and which is provided pursuant to any compulsory process under this Act or which is provided voluntarily in place of such compulsory process * * *" (Section 21(f) of the FTC Act, as added by Section 14 of Pub. L. No. 96-252, 94 Stat. 385, App., *infra*, 9a).

Moreover, upon delivery of subpoenaed documents to the Commission, additional safeguards apply to prevent disclosure of information contained therein, except as

specifically authorized by the new statute. These safeguards extend to "any document or transcript of oral testimony received by the Commission pursuant to compulsory process in an investigation, a purpose of which is to determine whether any person may have violated any provision of the laws administered by the Commission * * *" (Section 21(b)(1); App., *infra*, 2a-3a). The Commission is required to designate a custodian for such materials who is responsible for their use (Section 21(b)(2)(A) and (b)(3)(A); App., *infra*, 3a). The statute further declares that "[e]xcept as otherwise provided in this section, while in the possession of the custodian, no documentary material * * * shall be available for examination by any individual other than a duly authorized officer or employee of the Commission without the consent of the person who produced the material * * *" (Section 21(b)(3)(C); App., *infra*, 4a). The statute permits the custodian to deliver such material to officers or employees of the Commission only for use in "a proceeding against a person, partnership, or corporation" (Section 21(b)(4); App., *infra*, 4a).

Disclosure to persons other than Commission employees and officers for use in Commission proceedings is permitted only in two limited situations—(1) disclosure to either House of Congress or a committee or subcommittee thereof, which must be accompanied by notice to the owner or submitter of the information of the request if the information is designated as confidential (Section 21(b)(3)(C); App., *infra*, 4a); and (2) disclosure to Federal or State law enforcement agencies, upon certification by such agencies that the information will be maintained in confidence and used only for official law enforcement purposes (Section 21(b)(6); App., *infra*, 5a-6a).

These provisions assure petitioners that none of the documents sought by the Commission's subpoena will be publicly disclosed except in the course of an adjudicatory proceeding before the Commission. Trade secrets and confidential commercial information will be maintained in confidence and used only for official law enforcement purposes by the Commission and federal or state enforcement agencies.[7] The only exception Congress has provided is for itself. It is well established, of course, that courts will not interfere with the right of Congress to obtain information in aid of its legitimate legislative functions. *Eastland* v. *United States Servicemen's Fund*, 421 U.S. 491 (1975).[8]

In light of the comprehensive protections Congress has provided, there is no need for this Court to determine whether petitioners were entitled to maintain an action for declaratory and injunctive relief seeking substantially the same protections.

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[7]In presenting the Conference Report to the Senate, Senator Ford, a conferee and sponsor of the legislation, stated:

> the respective prohibitions and authorities contained in section 6(f) [prohibition of publication of trade secrets and confidential business information] * * * and 21(f) [exemption from the Freedom of Information Act] apply regardless of whether the information was obtained before or after the effective date of the act. Sections 21(a), 21(b) [custodian procedures and restrictions against disclosure other than as permitted by the Act] * * * apply to material obtained by the Commission after the effective date of the act.

126 Cong. Rec. S5678 (daily ed. May 21, 1980). See also S. Rep. No. 500, 96th Cong., 1st Sess. 29 (1979).

[8]The D.C. Circuit has stated that "the Commission may not deny Congress access to confidential documents, including those that contain trade secrets." *FTC* v. *Owens-Corning Fiberglass Corp.*, 1980-1 Trade Cases (CCH) para. 63,228, at 78-110 (D.C. Cir. Mar. 13, 1980), citing *Exxon Corp.* v. *FTC*, 589 F. 2d 582, 585-586 (D.C. Cir. 1978), cert. denied, 441 U.S. 943 (1979); *Ashland Oil, Inc.* v. *FTC*, 548 F. 2d 977, 979 (D.C. Cir. 1976).

2. Quite apart from the protections afforded by the new statute, the court of appeals' decision does not merit review by this Court. The holding of the court of appeals is correct and applies legal principles established long ago by the decisions of this Court. In *Reisman* v. *Caplin*, 375 U.S. 440 (1964), this Court affirmed dismissal of a complaint seeking preenforcement review of an IRS summons. The Court noted that the taxpayers could "challenge the summons on any appropriate ground" (375 U.S. at 449) in an enforcement proceeding instituted by the IRS, and therefore had an adequate remedy at law. See also *FTC* v. *Claire Furnace Co.*, 274 U.S. 160 (1927).

This Court's later decision in *Abbott Laboratories* v. *Gardner*, 387 U.S. 136 (1967), does not, as petitioners contend (Pet. 13), modify *Reisman*. In *Abbott Laboratories* the court found that the "promulgation [of FDA drug labeling regulations] puts petitioners in a dilemma that it was the very purpose of the Declaratory Judgment Act to ameliorate" (387 U.S. at 152) because compliance with those regulations required costly changes in labels and other printed material (*ibid.*). Noncompliance would result in "serious criminal and civil penalties for the unlawful distribution of 'misbranded' drugs" (*id.* at 153). As noted by the court of appeals (Pet. App. 13a-14a, 18a), petitioners face no such dilemma here.[9] As the court of appeals observed in its modified opinion (Pet. App. 18a, 13a-14a):

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[9] *St. Regis Paper Co.* v. *United States*, 368 U.S. 208 (1961)—which predated *Reisman*—is not relevant here. In that case, the Commission issued notices of default with respect to orders to file certain special reports. Under the statutory scheme involved in *St. Regis*, which is inapplicable to subpoenas, penalties were imposed for every day of noncompliance after notice of default. This Court stated that the defaulting company could have contested the order after receiving a notice of default without awaiting suit by the government for

> Besides failing to satisfy the *Abbott* requirement of finality, plaintiffs did not establish whether the decision to comply with the subpoena placed them on the horns of a dilemma. * * * Wearly [was] under no compulsion to either turn over the documents to the FTC or suffer civil or criminal penalties as a result. He [was] free to await enforcement proceedings, and at that time, or thereafter, [could have] rais[ed] his objections to the inadequacy of the FTC confidentiality procedures. Nor does there appear to be any merit to Wearly's assertion that his refusal to comply with the subpoena could [have] expos[ed] him to a criminal contempt under §10 of the FTC Act, 15 U.S.C. §50. As with the statute at issue in *Reisman* v. *Caplin*, *supra* at 447, "[contempt] does not apply where the witness appears and interposes good faith challenges to the summons." See *American Motors Corp.* v. *FTC*, *supra* at 1338; *First National City Bank* v. *FTC*, 538 F. 2d 937 (2d Cir. 1976); *Anheuser-Busch, Inc.* v. *FTC*, *supra* at 490. Here, of course, there is nothing in the record to suggest that Wearly's non-compliance has been contumacious. [Footnote omitted.]

As petitioners recognize (Pet. 10, 13), the court of appeals' holding that *Reisman* bars the present action accords with the decision of other courts of appeals that have considered the issue. See, *e.g.*, *American Motors Corp.* v. *FTC*, 601 F. 2d 1329, 1335-1337 (6th Cir.), cert. denied, No. 79-306 (Nov. 5, 1979); *Anheuser-Busch, Inc.* v. *FTC*, 359 F. 2d 487, 489 (8th Cir. 1966) (per Blackmun, J.).

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collection of forfeitures (*id.* at 226-227). The Court carefully distinguished the situation before it from that in *FTC* v. *Claire Furnace Co.*, 274 U.S. 160 (1927), where no threat of forfeitures existed for noncompliance and, accordingly, an injunction suit "would not lie" (368 U.S. at 226).

Finally, any possibility that a party's good faith resistance to a subpoena prior to judicial enforcement might be challenged in a criminal prosecution under Section 10 of the FTC Act, 15 U.S.C. 50, has been eliminated by Section 6 of Pub. L. No. 96-252, 94 Stat. 376, which provides that penalties may not be imposed under Section 10 for noncompliance with a Commission subpoena until a district court has entered an order directing compliance with the subpoena (App., *infra*, 2a).[10]

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[10]This provision amends the first paragraph of Section 10 of the FTC Act to include the words italicized below:

> Any person who shall neglect or refuse to attend and testify, or to answer any lawful inquiry or to produce *any* documentary evidence, if in his power to do so, in obedience to *an order of a district court of the United States directing compliance with* the subpoena or lawful requirement of the Commission, shall be guilty of an offense and upon conviction thereof by a court of competent jurisdiction shall be punished by a fine of not less than $1,000 nor more than $5,000, or by imprisonment for not more than one year, or by both such fine and imprisonment.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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JULY 1980

DOJ-1980-07

APPENDIX

[Public Law No. 96-252]

An Act

To amend the Federal Trade Commission Act to extend the authorization of appropriations contained in such Act, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SHORT TITLE

SECTION 1. This Act may be cited as the "Federal Trade Commission Improvements Act of 1980)).

* * * * *

DISCLOSURE OF COMMERCIAL OR FINANCIAL INFORMATION; QUARTERLY FINANCIAL REPORTS

SEC. 3. (a) Section 6(f) of the Federal Trade Commission Act (15 U.S.C. 46(f)) is amended—

(1) by striking out ", except trade secrets and names of customers, as it shall deem expedient" and inserting in lieu thereof "as are"; and

(2) by inserting before the period at the end thereof the following: "*Provided*, That the Commission shall not have any authority to make public any trade secret or any commercial or financial information which is obtained from any person and which is privileged or confidential, except that the Commission may disclose such information to officers and employees of appropriate Federal law enforcement agencies or to any officer or employee of any State law enforcement agency upon the prior

certification of an officer of any such Federal or State law enforcement agency that such information will be maintained in confidence and will be used only for official enforcement purposes".

* * * * *

ENFORCEMENT AUTHORITY

SEC. 6. The first undesignated paragraph of section 10 of the Federal Trade Commission Act (15 U.S.C. 50) is amended—

(1) by inserting "any" after "produce"; and

(2) by inserting "an order of a district court of the United States directing compliance with" after "obedience to".

* * * * *

CONFIDENTIALITY

SEC. 14. The Federal Trade Commission Act (15 U.S.C. 41 et seq.), as amended in section 13, is further amended by inserting after section 20 the following new section:

"SEC. 21. (a) For purposes of this section:

"(1) The term 'material' means documentary material, written reports or answers to questions, and transcripts of oral testimony.

"(2) The term 'Federal agency' has the meaning given it in section 552(e) of title 5, United States Code.

"(b)(1) With respect to any document or transcript of oral testimony received by the Commission pursuant to compulsory process in an investigation, a purpose of which is to determine whether any person may have violated any provision of the laws administered by the

Commission, the procedures established in paragraph (2) through paragraph (7) shall apply.

"(2)(A) The Commission shall designate a duly authorized agent to serve as custodian of documentary material, or written reports or answers to questions, and transcripts of oral testimony, and such additional duly authorized agents as the Commission shall determine from time to time to be necessary to serve as deputies to the custodian.

"(B) Any person upon whom any demand for the production of documentary material has been duly served shall make such material available for inspection and copying or reproduction to the custodian designated in such demand at the principal place of business of such person (or at such other place as such custodian and such person thereafter may agree and prescribe in writing or as the court may direct pursuant to section 20(h)) on the return date specified in such demand (or on such later date as such custodian may prescribe in writing). Such person may upon written agreement between such person and the custodian substitute copies for originals of all or any part of such material.

"(3)(A) The custodian to whom any documentary material, written reports or answers to questions, and transcripts of oral testimony are delivered shall take physical possession of such material, reports or answers, and transcripts, and shall be responsible for the use made of such material, reports or answers, and transcripts, and for the return of material, pursuant to the requirements of this section.

"(B) The custodian may prepare such copies of the documentary material, written reports or answers to questions, and transcripts of oral testimony as may be required for official use by any duly authorized officer or

employee of the Commission under regulations which shall be promulgated by the Commission. Notwithstanding subparagraph (C), such material and transcripts may be used by any such officer or employee in connection with the taking of oral testimony under this section.

"(C) Except as otherwise provided in this section, while in the possession of the custodian, no documentary material, reports or answers to questions, and transcripts of oral testimony shall be available for examination by any individual other than a duly authorized officer or employee of the Commission without the consent of the person who produced the material or transcripts. Nothing in this section is intended to prevent disclosure to either House of the Congress or to any committee or subcommittee of the Congress, except that the Commission immediately shall notify the owner or provider of any such information of a request for information designated as confidential by the owner or provider.

"(D) While in the possession of the custodian and under such reasonable terms and conditions as the Commission shall prescribe—

> "(i) documentary material or written reports shall be available for examination by the person who produced the material, or by any duly authorized representative of such person; and
>
> "(ii) answers to questions in writing and transcripts of oral testimony shall be available for examination by the person who produced the testimony or by his attorney.

"(4) Whenever the Commission has instituted a proceeding against a person, partnership, or corporation,

the custodian may deliver to any officer or employee of the Commission documentary material, written reports or answers to questions, and transcripts of oral testimony for official use in connection with such proceeding. Upon the completion of the proceeding, the officer or employee shall return to the custodian any such material so delivered which has not been received into the record of the proceeding.

"(5) If any documentary material, written reports or answers to questions, and transcripts of oral testimony have been produced in the course of any investigation by any person pursuant to compulsory process and—

> "(A) any proceeding arising out of the investigation has been completed; or
>
> "(B) no proceeding in which the material may be used has been commenced within a reasonable time after completion of the examination and analysis of all such material and other information assembled in the course of the investigation; then the custodian shall, upon written request of the person who produced the material, return to the person any such material which has not been received into the record of any such proceeding (other than copies of such material made by the custodian pursuant to paragraph (3)(B)).

"(6) The custodian of any documentary material, written reports or answers to questions, and transcripts of oral testimony may deliver to any officers or employees of appropriate Federal law enforcement agencies, in response to a written request, copies of such material for use in connection with an investigation or proceeding under the jurisdiction of any such agency. Such materials shall not be made available to any such agency until the custodian receives certification of any officer of such

agency that such information will be maintained in confidence and will be used only for official law enforcement purposes. Such documentary material, written reports or answers to questions, and transcripts of oral testimony may be used by any officer or employee of such agency only in such manner and subject to such conditions as apply to the Commission under this section. The custodian may make such materials available to any State law enforcement agency upon the prior certification of any officer of such agency that such information will be maintained in confidence and will be used only for official law enforcement purposes.

"(7) In the event of the death, disability, or separation from service in the Commission of the custodian of any documentary material, written reports or answers to questions, and transcripts of oral testimony produced under any demand issued under this Act, or the official relief of the custodian from responsibility for the custody and control of such material, the Commission promptly shall—

> "(A) designate under paragraph (2)(A) another duly authorized agent to serve as custodian of such material; and
>
> "(B) transmit in writing to the person who produced the material or testimony notice as to the identity and address of the successor so designated.

Any successor designated under paragraph (2)(A) as a result of the requirements of this paragraph shall have (with regard to the material involved) all duties and responsibilities imposed by this section upon his predecessor in office with regard to such material, except that he shall not be held responsible for any default or dereliction which occurred before his designation.

"(c)(1) All information reported to or otherwise obtained by the Commission which is not subject to the requirements of subsection (b) shall be considered confidential when so marked by the person supplying the information and shall not be disclosed, except in accordance with the procedures established in paragraph (2) and paragraph (3).

"(2) If the Commission determines that a document marked confidential by the person supplying it may be disclosed because it is not a trade secret or commercial or financial information which is obtained from any person and which is privileged or confidential, within the meaning of section 6(f), then the Commission shall notify such person in writing that the Commission intends to disclose the document at a date not less than 10 days after the date of receipt of notification.

"(3) Any person receiving such notification may, if he believes disclosure of the document would cause disclosure of a trade secret, or commercial or financial information which is obtained from any person and which is privileged or confidential, within the meaning of section 6(f), before the date set for release of the document, bring an action in the district court of the United States for the district within which the documents are located or in the United States District Court for the District of Columbia to restrain disclosure of the document. Any person receiving such notification may file with the appropriate district court or court of appeals of the United States, as appropriate, an application for a stay of disclosure. The documents shall not be disclosed until the court has ruled on the application for a stay.

"(d)(1) The provisions of subsection (c) shall not be construed to prohibit—

"(A) the disclosure of information to either House of the Congress or to any committee or subcommittee of the Congress, except that the Commission immediately shall notify the owner or provider of any such information of a request for information designated as confidential by the owner or provider;

"(B) the disclosure of the results of any investigation or study carried out or prepared by the Commission, except that no information shall be identified nor shall information be disclosed in such a manner as to disclose a trade secret of any person supplying the trade secret, or to disclose any commercial or financial information which is obtained from any person and which is privileged or confidential;

"(C) the disclosure of relevant and material information in Commission adjudicative proceedings or in judicial proceedings to which the Commission is a party; or

"(D) the disclosure to a Federal agency of disaggregated information obtained in accordance with section 3512 of title 44, United States Code, except that the recipient agency shall use such disaggregated information for economic, statistical, or policymaking purposes only, and shall not disclose such information in an individually identifiable form.

"(2) Any disclosure of relevant and material information in Commission adjudicative proceedings or in judicial proceedings to which the Commission is a party shall be governed by the rules of the Commission for adjudicative proceedings or by court rules or orders, except that the rules of the Commission shall not be

amended in a manner inconsistent with the purposes of this section.

"(e) Nothing in this section shall supersede any statutory provision which expressly prohibits or limits particular disclosures by the Commission, or which authorizes disclosures to any other Federal agency.

"(f) Any material which is received by the Commission in any investigation, a purpose of which is to determine whether any person may have violated any provision of the laws administered by the Commission, and which is provided pursuant to any compulsory process under this Act or which is provided voluntarily in place of such compulsory process shall be exempt from disclosure under section 552 of title 5, United States Code."